

IN THE MISSOURI SUPREME COURT

SC84372

STATE OF MISSOURI ex rel. CINDY KERTZ,

Relator,

vs.

**THE HONORABLE MARGARET M. NEILL,
PRESIDING JUDGE OF THE MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT (ST. LOUIS CITY),**

Respondent.

ORIGINAL PROCEEDING IN MANDAMUS

**BRIEF OF MISSOURI ORGANIZATION OF
DEFENSE LAWYERS AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENT**

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TABLE OF CONTENTS

	<u>Page(s)</u>
Table of Authorities	iii
Jurisdictional Statement	6
Statement of Facts	7
Interest of <i>Amicus Curiae</i>	8
Points Relied On	10
I.	10
II.	11
Argument	13
Conclusion	31
Certificate of Compliance with Rules 84.06(c) and (g).	32
Certificate of Service	33

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Crabtree v. Bugby</i> , 967 S.W.2d 66 (Mo. banc 1998)	22
<i>Dan Ficken Pools, Inc. v. Flynn</i> , 592 S.W.2d 213 (Mo. App. E.D. 1979)	16
<i>Norval v. Whitesell</i> , 605 S.W.2d 789 (Mo. banc 1980)	14
<i>Sledge v. Town & Country Tire Centers, Inc.</i> , 654 S.W.2d 176 (Mo. App. E.D. 1983)	16
<i>State ex rel. Allen v. Barker</i> , 581 S.W.2d 818 (Mo. 1979)	18
<i>State ex rel. Baker v. Goodman</i> , 364 Mo. 1202, 274 S.W.2d 293 (Mo. 1954)	18
<i>State ex rel. Bitting v. Adolf</i> , 704 S.W.2d 671 (Mo. 1986)	18
<i>State ex rel. Bowden v. Jensen</i> , 359 S.W.2d 343 (Mo. banc 1962) . .	11, 12, 20, 24, 25, 26, 28
<i>State ex rel. Brentwood School District v. State Tax Commission</i> , 589 S.W.2d 613 (Mo. banc 1979)	14
<i>State ex rel. Bunker Resource, Recycling and Reclamation, Inc. v. Dierker</i> , 955 S.W.2d 931 (Mo. banc 1997)	15
<i>State ex rel. Columbia National Bank v. Davis</i> , 314 Mo. 373, 284 S.W. 464 (Mo. banc 1926)	18
<i>State ex rel. Commissioners of the State Tax Commission v. Schneider</i> ,	

609 S.W.2d 149 (Mo. banc 1980)	11, 14
<i>State ex rel. Dick Proctor Imports, Inc. v. Gaertner,</i>	
671 S.W.2d 273 (Mo. banc 1984)	18
<i>State ex rel. England v. Koehr,</i> 849 S.W.2d 168	
(Mo. App. E.D. 1993)	12, 24
<i>State ex rel. Farrell v. Sanders,</i> 897 S.W.2d 125	
(Mo. App. E.D. 1995)	28
<i>State ex rel. Linthicum v. Calvin,</i> 57 S.W.3d 855 (Mo. banc 2001) . . .	10, 11, 13, 14, 15, 19, 20, 21, 22
<i>State ex rel. Malone v. Mummert,</i> 889 S.W.2d 822 (Mo. banc 1994) . .	18
<i>State ex rel. Milham v. Rickhoff,</i> 633 S.W.2d 733,	
4 Ed Law Rep. 1341 (Mo. banc 1982)	18
<i>State ex rel. Rothermich v. Gallagher,</i> 816 S.W.2d 194	
(Mo. banc 1991)	12, 16, 18, 27, 29
<i>State ex rel. Sayad v. Zych,</i> 642 S.W.2d 907 (Mo. banc 1982)	14
<i>State ex rel. Smith v. Atterbury,</i> 270 S.W.2d 399 (Mo. 1954)	26
<i>State ex rel. SSM Health Care of St. Louis v. Neill,</i>	
___ S.W.3d ____, No. SC84092, Mo. banc June 25, 2002	19
<i>State ex rel. Whiteman v. James,</i> 364 Mo. 589,	
265 S.W.2d 298 (Mo. banc 1954)	18

<i>Washington University v. ASD Communications, Inc.</i> , 821 S.W.2d 895 (Mo. App. E.D. 1992)	20
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Statutes

Missouri Rule of Civil Procedure 84.05(f)	6
Missouri Rule of Civil Procedure 51.045	28
Section 351.586 R.S.Mo.	25
Section 351.620 R.S.Mo.	24, 25
Section 508.010 R.S.Mo. 13, 16, 20, 21, 26, 27,	10, 11, 18, 19, 23, 24, 30
Section 508.040 R.S.Mo. 30	21, 27,

JURISDICTIONAL STATEMENT

Amicus Curiae Missouri Organization of Defense Lawyers (“MODL”) adopts and incorporates herein Respondent’s Jurisdictional Statement. MODL further files its Brief

pursuant to its Motion for Leave to File Brief in accordance with Missouri Rule of Civil Procedure 84.05(f).

STATEMENT OF FACTS

For purposes of its Brief, *Amicus Curiae* MODL adopts and incorporates Respondent's Statement of Facts.

INTEREST OF AMICUS CURIAE

MODL is a private, voluntary association of Missouri attorneys dedicated to promoting improvements in the administration of justice and to optimizing the quality of the services which the legal profession renders to society. To that end, MODL members work to advance and exchange information, knowledge and ideas among themselves, the public, and the legal community in an effort to enhance the skills of civil defense lawyers and to evaluate the standards of trial practice in this state. The attorneys who compose MODL's membership devote a substantial amount of their professional time to representing defendants in civil litigation, including individuals. As an organization composed entirely of Missouri attorneys, MODL is concerned and interested in the establishment of fair and predictable laws affecting tort litigation involving individual and corporate clients that will maintain the integrity and fairness of civil litigation for both plaintiffs and defendants.

The issues presented by this appeal, including venue issues, generate considerable interest by the Missouri legal, business, and consumer communities. MODL believes that the resolution of the issues presented by this appeal could have a dramatic and substantial impact on Missouri tort law.

MODL believes this Court will benefit from a policy-oriented discussion of some of the broad-based issues presented by this appeal. Therefore, the purpose of this brief is to provide the Court with an analysis of some of the issues from the perspective of an

organization of attorneys who represent and advise individuals and businesses and defend individuals in tort claims.

POINTS RELIED ON

- I. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE HER ORDER OF DECEMBER 18, 2002, GRANTING THE MOTION TO TRANSFER, BECAUSE VENUE OF THIS ACTION AGAINST AN INDIVIDUAL AND A CORPORATION IS GOVERNED BY § 508.010 AND § 508.010 REQUIRES THAT THIS TORT ACTION BE BROUGHT WHERE A DEFENDANT RESIDES OR THE COUNTY WHERE THE CAUSE OF ACTION ACCRUED, IN THAT THIS ACTION WAS BROUGHT IN THE CITY OF ST. LOUIS AGAINST AN INDIVIDUAL AND CORPORATE DEFENDANT AND NEITHER DEFENDANT RESIDES IN THE CITY OF ST. LOUIS, AND THE UNDERLYING CAUSE OF ACTION ACCRUED IN PERRY COUNTY, MISSOURI. THUS, THE ACTION CANNOT BE PROPERLY BROUGHT IN THE CITY OF ST. LOUIS. FURTHERMORE, AS THIS COURT RECENTLY HELD IN *STATE EX REL. LINTHICUM V. CALVIN*, 57 S.W.3D 855 (MO. BANC 2001), THE FACT THAT PLAINTIFF FILED A PETITION INITIALLY NAMING ONLY THE CORPORATE DEFENDANT ONLY TO AMEND HER PETITION WITHIN HOURS OF FILING**

THE ORIGINAL PETITION ADDING AN INDIVIDUAL DEFENDANT SHOULD NOT, AND DOES NOT, ALLOW PLAINTIFF TO DEPRIVE THE INDIVIDUAL DEFENDANT OF HIS VENUE RIGHTS.

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001)

State ex rel. Commissioners of the State Tax Commission v. Schneider, 609 S.W.2d 149 (Mo. banc 1980)

State ex rel. Bowden v. Jensen, 359 S.W.2d 343, 350 (Mo. 1962)

II. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE HER ORDER OF DECEMBER 18, 2001, GRANTING THE MOTION TO TRANSFER VENUE, BECAUSE VENUE UNDER § 508.010 R.S.MO. IS IMPROPER IN THE CITY OF ST. LOUIS, IN THAT A FOREIGN CORPORATION IS A RESIDENT OF THE COUNTY IN WHICH IT MAINTAINS ITS REGISTERED AGENT, AND DEFENDANT THE BURLINGTON NORTHERN AND SANTA FE RAILROAD COMPANY'S REGISTERED AGENT IS MAINTAINED IN ST. LOUIS COUNTY, MISSOURI; THE INDIVIDUAL DEFENDANT IS A RESIDENT OF SCOTT COUNTY, MISSOURI; AND THE CAUSE OF ACTION ACCRUED IN PERRY COUNTY, MISSOURI.

State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo. 1962)

State ex rel. England v. Koehr, 849 S.W.2d 168 (Mo. App. E.D. 1993)

Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. banc 1991)

ARGUMENT

- I. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE HER ORDER OF DECEMBER 18, 2002, GRANTING THE MOTION TO TRANSFER, BECAUSE VENUE OF THIS ACTION AGAINST AN INDIVIDUAL AND A CORPORATION IS GOVERNED BY § 508.010 AND § 508.010 REQUIRES THAT THIS TORT ACTION BE BROUGHT WHERE A DEFENDANT RESIDES OR THE COUNTY WHERE THE CAUSE OF ACTION ACCRUED, IN THAT THIS ACTION WAS BROUGHT IN THE CITY OF ST. LOUIS AGAINST AN INDIVIDUAL AND CORPORATE DEFENDANT AND NEITHER DEFENDANT RESIDES IN THE CITY OF ST. LOUIS, AND THE UNDERLYING CAUSE OF ACTION ACCRUED IN PERRY COUNTY, MISSOURI. THUS, THE ACTION CANNOT BE PROPERLY BROUGHT IN THE CITY OF ST. LOUIS. FURTHERMORE, AS THIS COURT RECENTLY HELD IN *STATE EX REL. LINTHICUM V. CALVIN*, 57 S.W.3D 855 (MO. BANC 2001), THE FACT THAT PLAINTIFF FILED A PETITION INITIALLY NAMING ONLY THE CORPORATE DEFENDANT ONLY TO AMEND HER PETITION WITHIN HOURS OF FILING

**THE ORIGINAL PETITION ADDING AN INDIVIDUAL
DEFENDANT SHOULD NOT, AND DOES NOT, ALLOW
PLAINTIFF TO DEPRIVE THE INDIVIDUAL DEFENDANT OF HIS
VENUE RIGHTS.**

**Writ of Mandamus does not Lie
to Adjudicate and Reverse Existing Law.**

It is first necessary to address the method by which Relator brings his claims, a Petition for a Writ of Mandamus. Mandamus is a discretionary writ, not a writ of right. *Norval v. Whitesell*, 605 S.W.2d 789, 791 (Mo. banc 1980). Mandamus will lie only when there is a clear, unequivocal and specific right. *State ex rel. Sayad v. Zych*, 642 S.W.2d 907, 911 (Mo. banc 1982). Furthermore, the right sought to be enforced must be clearly established and presently existing. *State ex rel. Commissioners of the State Tax Commission v. Schneider*, 609 S.W.2d 149, 151 (Mo. banc 1980). A writ of mandamus is not appropriate to establish a legal right, but only to compel performance of a right that already exists. *State ex rel. Brentwood School District v. State Tax Commission*, 589 S.W.2d 613, 614 (Mo. banc 1979). As this Court has often stated, the purpose of a writ is to execute, not adjudicate. *Schneider*, 609 S.W.2d at 151.

In the present case, Relators have petitioned this Court requesting that this Court's recent holding in *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001), be reversed and that Respondent's court order transferring this case pursuant to the holding

in *Linthicum* be vacated. *Linthicum* clearly holds that under Missouri law a suit is “brought” whenever a defendant is added as a party to a lawsuit. There has been no statutory change in Missouri law regarding venue, commencement of an action or the addition of a party since this Court issued its decision in *Linthicum*. As stated above, the purpose of a writ of mandamus is to execute, not adjudicate. Furthermore, mandamus is only appropriate to require the performance of a ministerial act. *State ex rel. Bunker Resource, Recycling and Reclamation, Inc. v. Dierker*, 955 S.W.2d 931, 933 (Mo. banc 1997). Here, Relator is seeking to change well-established law regarding mandamus and use it as a vehicle to reverse existing case law—specifically, a decision by this Court. The allowance of a writ of mandamus in this case would not only represent a clear departure from existing Missouri law, it would also represent a departure from Missouri policy regarding how issues are adjudicated and reviewed in the Missouri court system.

Linthicum Should Not be Overruled.

Relator argues in this mandamus proceeding that this Court should overturn its recent decision in *Linthicum* because 1) it is not supported by Missouri venue statutes and 2) it is unworkable in practice. Contrary to Relator’s position, this Court’s holding in *Linthicum* is supported by the Missouri venue statutes.

Venue in Missouri is determined solely by statute. Chapter 508 sets out the provisions that control venue. The purpose of the venue statutes is to provide a convenient, logical and orderly forum for litigation. *State ex rel. Rothermich v.*

Gallagher, 816 S.W.2d 194, 195 (Mo. banc 1991), citing *Sledge v. Town & Country Tire Centers, Inc.*, 654 S.W.2d 176, 180 (Mo. App. E.D. 1983), and *Dan Ficken Pools, Inc. v. Flynn*, 592 S.W.2d 213 (Mo. App. E.D. 1979).

The general venue statute, § 508.010, provides as follows:

Suits instituted by summons shall, except as otherwise provided by law, be brought:

- (1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found;
- (2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;
- (3) When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides;
- (4) When all the defendants are nonresidents of the state, suit may be brought in any county in this state;
- (5) Any action, local or transitory, in which any county shall be plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside, or in the county suing and where the defendants, or one of them, may be found;

(6) In all tort actions the suit may be brought in the county where the cause of action accrued regardless of the residence of the parties, and process therein shall be issued by the court of such county and may be served in any county within the state; provided, however, that in any action for defamation or for invasion or privacy the cause of action shall be deemed to have accrued in the county in which the defamation or invasion was first published.

The corporate venue statute, § 508.040, states as follows:

Suits against corporations shall be commenced either in the county where the cause of action accrued, or in case the corporation defendant is a railroad owning, controlling or operating a railroad running into or through two or more counties in this state, then in either of such counties, or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business.

In applying and construing the above statutes, this Court has consistently held and recognized that the general venue statute, § 508.010, applies when one or more individuals are sued or when one or more corporations are sued together with one or more individuals. *See e.g. State ex rel. Malone v. Mummert*, 889 S.W.2d 822 (Mo. banc 1994); *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194 (Mo. 1991); *State ex rel.*

Bitting v. Adolf, 704 S.W.2d 671 (Mo. 1986); *State ex rel. Dick Proctor Imports, Inc. v. Gaertner*, 671 S.W.2d 273 (Mo. banc 1984); *State ex rel. Allen v. Barker*, 581 S.W.2d 818 (Mo. 1979); *State ex rel. Baker v. Goodman*, 364 Mo. 1202, 274 S.W.2d 293 (Mo. 1954); *State ex rel. Whiteman v. James*, 364 Mo. 589, 265 S.W.2d 298 (Mo. banc 1954); *State ex rel. Columbia National Bank v. Davis*, 314 Mo. 373, 284 S.W. 464 (Mo. banc 1926). The presence of an individual defendant and the protection of the individual's venue rights has been a critical factor in determining that Chapter 508 requires that the general venue statute govern all actions where **an individual** is among the defendants.¹ The Missouri Legislature has also protected an individual's venue rights by addressing a venue statute that limits the venues where an action may be brought when an individual is sued. *See* § 508.010.

¹ The only exceptions to this rule have been where a special venue statute applies and provides that a suit against a particular defendant may **only** be sued in certain counties. *See State ex rel. Milham v. Rickhoff*, 633 S.W.2d 733, 4 Ed Law Rep. 1341 (Mo. banc 1982) (suit against a municipal corporation may **only** be commenced in county in which it is situated), and *State ex rel. SSM Health Care of St. Louis v. Neill*, ____ S.W.3d ____, No. SC84092, Mo. banc June 25, 2002 (suit against a not-for-profit corporation may only be brought in the county (1) where it maintains its registered agent, (2) where it maintains its principal place of business, or (3) where the alleged cause of action arose).

In keeping with this policy of protecting an individual's venue rights, this Court ruled in *Linthicum* that a suit is “brought” whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition. As this Court explained in *Linthicum*, “Although a suit is ‘brought’ against the original defendants when the petition is initially filed, in like manner, it is also ‘brought’ against subsequent defendants when they are added to the lawsuit by amendment.” *Linthicum*, 57 S.W.3d at 858. As this Court noted, “This interpretation protects all party defendants equally and gives effect to the intent of the legislature in enacting section 508.010(3).” *Id.*

To hold otherwise would serve to deny an individual defendant that was added as an additional defendant his or her venue rights. Venue is a personal privilege that cannot be waived on behalf of one defendant by the conduct of other defendants. *See Washington University v. ASD Communications, Inc.*, 821 S.W.2d 895, 896 (Mo. App. E.D. 1992). One defendant may waive venue but another defendant, even one that is subsequently added to the case, may still challenge improper venue. An individual resident of Missouri is entitled to the protections afforded by the general venue statute, § 508.010, so that suit may be brought against him or her only in a limited number of venues: 1) a county in which he or she resides (or in the county where plaintiff resides and all defendants may be found); 2) a county in which the co-defendant resides; or 3) in a tort action, in the county where the cause of action accrued. In addition to limiting the number of venues in which a suit against an individual Missouri resident may be

brought, § 508.010 allows Missouri citizens to know with definitiveness and certainty whether venue is proper when suit is brought against him or her. *See State ex rel. Bowden v. Jensen*, 359 S.W.2d 343, 350 (Mo. 1962).

The present case perhaps best illustrates why *Linthicum* should not be overruled. In the present case, the action was initially filed in the City of St. Louis against The Burlington Northern and Santa Fe Railway Company (BNSF) on September 12, 2001, at 4:32 p.m. Literally, within hours, a second amended petition was filed with the Court on September 13, 2001, at 8:37 a.m. In this first amended petition, an individual, Mark Pobst, was added as a defendant and a claim was brought against him for the first time. Service was obtained on both defendants in October of 2001. Relator argues that the corporate venue statute, § 508.040, should control this action, since the action was initially brought against a single corporate defendant. Under § 508.040, an action against a corporation may be brought in every county in which it operates its line of railroad, as well as any county where it has an office or agent for the transaction of its usual and customary business. Venue under § 508.040 on a claim against BNSF would therefore be proper in the Counties of Adair, Atchinson, Berry, Barton, Buchanan, Cape Girardeau, Carroll, Chariton, Clark, Clay, Crawford, Dade, Dunklin, Franklin, Green, Holt, Howell, Iron, Jackson, Jasper, Jefferson, Knox, Laclede, Lawrence, Lewis, Lincoln, Linn, Livingston, Macon, Marion, Monroe, New Madrid, Newton, Oregon, Perniscot, Perry, Phelps, Pike, Platte, Pulaski, Ralls, Ray, St. Charles, St. Louis, St. Genevieve, Scott,

Shelby, Tanney, Webster, Wright, and the City of St. Louis. However, if the Court's decision in *Linthicum* is followed, venue of this action that was brought against Mark Pobst and BNSF is governed by § 508.010. Under § 508.010, proper venue is limited to Perry County (where the accident and cause of action arose), Scott County (where Mark Pobst resides), or St. Louis County (where BNSF resides). Accordingly, if this Court were to reverse *Linthicum*, the individual defendant, as a result of Plaintiff's decision to initially name BNSF and within hours file an amended petition adding Mark Pobst as a defendant, would subject the individual defendant to suit in numerous counties which have no nexus to this cause of action.

Relator mistakenly argues that the rule announced by this Court in *Linthicum* is "unworkable." However, the rule in *Linthicum* provides a bright-line, easily-applied method of determining whether venue is proper. It is an objective standard that can be applied merely by looking at when the suit was brought against the defendants. It is a simple test that does not encourage manipulation of the venue statutes. It is true that under this rule proper venue may change during the course of the action if additional defendants are added by the plaintiff. However, the venue statutes clearly provide a solution to this situation by providing that the place where the tort occurred is always a proper venue for a tort action regardless of who is added as a defendant. Therefore, if a tort action is brought where it accrued, venue will not change regardless of who is added as a defendant. It should also be noted that a plaintiff maintains control in the selection

of the venue, in that it is only defendants that are added by the plaintiff, not third party defendants added by a defendant, that determine where venue is proper.

This Court should not overturn its decision in *Linthicum*, in that it is fully supported by the statutory language of Chapter 538 and embodies the policy of protecting an individual's venue rights. Furthermore, as this Court explained in *Crabtree v. Bugby*, 967 S.W.2d 66, 71 (Mo. banc 1998), this Court should not lightly disturb its own precedent. Mere disagreement by the current Court with the statutory analysis of a predecessor Court is not a satisfactory basis for violating the doctrine of *stare decisis*. *Id.* at 71-72. Finally, “[t]hose who disagree with the statute and this Court’s precedent analyzing the statute are free to seek redress in the legislative arena.” *Id.* at 72.

II. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE HER ORDER OF DECEMBER 18, 2001, GRANTING THE MOTION TO TRANSFER VENUE, BECAUSE VENUE UNDER § 508.010 R.S.MO. IS IMPROPER IN THE CITY OF ST. LOUIS, IN THAT A FOREIGN CORPORATION IS A RESIDENT OF THE COUNTY IN WHICH IT MAINTAINS ITS REGISTERED AGENT, AND DEFENDANT THE BURLINGTON NORTHERN AND SANTA FE RAILROAD COMPANY’S REGISTERED AGENT IS MAINTAINED IN ST. LOUIS COUNTY, MISSOURI; THE INDIVIDUAL DEFENDANT IS

**A RESIDENT OF SCOTT COUNTY, MISSOURI; AND THE CAUSE
OF ACTION ACCRUED IN PERRY COUNTY, MISSOURI.**

The crux of Relator's argument in Point II is that the residence of a foreign corporation under § 508.010 R.S.Mo. should be any county in which the corporation has offices or agents for the transaction of its usual and customary business. However, the Missouri Supreme Court has held for at least 40 years that the residence of both domestic and foreign corporations for purposes of venue pursuant to § 508.010 R.S.Mo. is the **location of the registered agent**. See *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343, 350 (Mo. banc 1962); see also *State ex rel. England v. Koehr*, 849 S.W.2d 168, 169 (Mo. App. E.D. 1993). This interpretation of "residence" is well grounded in public policy; it evolved because of the interest of protecting the resident individual defendant, and not necessarily the corporate defendant, from the indefiniteness of knowing whether venue as to him was proper. In *Bowden*, this Court specifically enunciated this concern as follows:

The theory that Sec. 351.620 was intended to give foreign business corporations a specific, definite and certain residence in this state, and that Sec. 508.010 subd. (2) should be construed with it, conforms to good business practice and the proper protection of the rights of individual defendants who may be joined with corporate defendants. Such a construction makes for definiteness and certainty

and an individual defendant when so joined may immediately and definitely determine whether the venue of the action is proper or improper as to him. It may not make any difference to such a foreign business corporation in what county the plaintiff may file his action, but, on the other hand, it may be vitally important to the particular individual defendant the plaintiff seeks to join as an additional defendant in the action.

Bowden, 359 S.W.2d at 350. Although § 351.620 was repealed in 1990, the information contained therein is now set forth in § 351.586, which states as follows:

Each foreign corporation authorized to transact business in this state shall continuously maintain in this state:

- (1) A registered office that may be the same as any of its places of business; and
- (2) A registered agent, who may be:
 - (a) An individual who resides in this state and whose business office is identical with the registered office;
 - (b) A domestic corporation or not for profit domestic corporation whose business office is identical with the registered office; or

(c) A foreign corporation or foreign not for profit corporation authorized to transact business in this state whose business office is identical with the registered office.

Thus, a foreign corporation is still required to maintain a registered agent in the State of Missouri, the location of which or whom has been construed to be the “residence” of said corporation under § 508.010 R.S.Mo. *See Bowden, supra.* We can assume that the legislature was aware of the construction that the Missouri Supreme Court had placed on § 508.010 in terms of “residence” of a foreign corporation; if the legislature had desired to change this construction, it could have done so, particularly in light of the fact that it amended § 508.010 R.S.Mo. in 1965, three years after *Bowden* was handed down. *See, e.g., State ex rel. Smith v. Atterbury*, 270 S.W.2d 399, 403-404 (Mo. 1954) (“where the Legislature, after a statute has received a settled judicial construction by a court of last resort, re-enacts it or carries it over without change or reincorporates the exact language theretofore construed, it must be presumed that the Legislature knew of and adopted such construction. . . .”)

In addition, this interpretation may be reconciled with the case law interpreting the residence of a foreign **insurance** corporation under § 508.010 to be any county where such corporation has or usually keeps an office or agent for the transaction of usual and customary business, because foreign insurance corporations, unlike all other corporations,

are not required to maintain a registered office and agent under Chapter 351. *See State of Missouri ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 198-201 (Mo. banc 1991).

Furthermore, it should be noted that the Missouri Legislature does not speak in terms of “residence” in setting forth the counties in which a corporate defendant may be sued under the corporate venue statute. *See* § 508.040 R.S.Mo.² Instead, it focuses on places or offices of business, not residence. Apparently, the Missouri Legislature has determined that residence is not a consideration when determining where suit may be brought against a corporation. Such is not the case in suits brought against individuals or individuals and corporations. In § 508.010, the Missouri Legislature has determined that suits against individuals based on torts must be brought in the county where the tort occurred, where one of the defendants resides, or where the plaintiff resides and the defendants can be found. The Missouri Legislature also defines place of residence for both individuals (§ 1.020) and corporations (§ 351.375). In so doing, the Missouri Legislature has chosen to limit the places where an individual may be sued and also assured that there will be some logical nexus between the place of suit and the individual.

² Section 508.040 R.S.Mo., the corporate venue statute, states that suits against corporations shall be commenced “either in the county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business.”

Missouri courts have traditionally recognized that venue is an important individual right. *See, e.g., State ex rel. Farrell v. Sanders*, 897 S.W.2d 125, 127 (Mo. App. E.D. 1995). As recognized by the court in *Bowden*, which was cited with authority in 1993 by the Missouri Court of Appeals in *England, supra*, it is the protection of the individual defendant who may be joined with a corporation which is of paramount concern in construing “residence” as the location of the registered agent. This construction is particularly important now, given the enactment of Rule 51.045 of the Missouri Rules of Civil Procedure, in which a defendant has a limited amount of time in which to determine whether venue is proper and, if it is not proper, file a venue challenge. A defendant may not simply file an answer with a venue challenge as an affirmative defense to preserve the matter and, as discovery reveals more facts as to the propriety of venue, file a motion asserting the challenge. Today, the need for definiteness and certainty from the outset is thus even more crucial for an individual to assert his or her venue rights under Rule 51.045.

A change in the law to allow suit to be commenced against those individuals who are joined as defendants with one or more corporations in any county where said corporations have offices or agents for the transaction of their usual and customary business would have disastrous effects. Such a construction would potentially allow suit in numerous faraway counties to which the individual defendant has no connection, in that the cause of action did not accrue there nor does the individual defendant reside

there. This would circumvent the very purpose of the venue statutes, which is to provide a convenient, logical, and orderly forum for litigation. *See, e.g., State ex rel. Rothermich*, 816 S.W.2d at 196. In addition, the cost of defending a suit in a faraway county to which the individual has no connection could potentially be quite financially burdensome to the individual who has no insurance to cover the costs of defending the suit or to an individual defendant that faces higher insurance costs as a result of such suits. Insurance companies may raise their premiums or even refuse to underwrite homeowners' and automobile policies for individuals, if their individual insureds are subject to suit in venues to which they have no connection. Quite simply, it would be impossible to underwrite such risks, because a potential insurer could never be able to determine the venues in which an individual would be subject to suit, in that the venue may depend on each and every place of business of an often unknown corporate co-defendant. These issues are not as worrisome to corporate defendants, because the costs of defending such suits in every location where said corporations do business are a cost of doing business and can potentially be passed on to the consumer. However, they are significant to individual Missouri residents. Thus, to construe § 508.040 as applying when there are both corporate and individual defendants, or to construe the residence of a corporation under § 508.010 as any place where the corporation has an office or agent for the transaction of business, would have devastating effects on the individual defendants in terms of cost of defending the suit and/or the cost or ability to procure insurance. This Court should

not overrule statutory construction that has been in place for 40 years, and has been presumed adopted by the Missouri Legislature, and find that the residence of a foreign corporation under § 508.010 R.S.Mo. is any county in which the corporation has offices or agents for the transaction of its usual and customary business.

CONCLUSION

Based on the foregoing, *Amicus Curiae* Missouri Organization of Defense Lawyers respectfully suggests that a permanent writ of mandamus should not issue in the present case. Respondent's Order transferring this case to St. Louis County is proper under Missouri venue statutes and correctly applies well-established precedent.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 84.06(C) AND (G)

Robyn Greifzu Fox, the undersigned lead attorney of record for *Amicus Curiae* Missouri Organization of Defense Lawyers in the above-referenced appeal, certifies pursuant to Rules 84.06(c) and (g) of the Missouri Supreme Court that:

1. The Brief complies with the limitations contained in Rule 84.06(c);
2. The Brief, including cover page, signature blocks and certificate of service contains 4,650 words, as determined by the word count tool contained in Microsoft Word 97 software with which this Brief was prepared; and
3. The diskette accompanying this Brief has been scanned for viruses and to the best knowledge, information and belief of the undersigned is virus free.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that two copies of the foregoing brief and one copy of accompanying disks were mailed, postage prepaid, to the following this 12th day of August, 2002, to: Mr. Patrick J. Hagerty, Mr. Maurice B. Graham, Mr. Morry S. Cole, Gray, Ritter & Graham, P.C., 701 Market Street, Suite 800, St. Louis, Missouri 63101, Counsel for Relator; Mr. William A. Brasher, Brasher Law Firm, L.C., One Metropolitan Square, Suite 2300, St. Louis, Missouri 63102, Attorney for Defendants The Burlington Northern and Santa Fe Railroad Company and Mark C. Pobst; and The Honorable Margaret M. Neill, St. Louis City Circuit Court, 10 N. Tucker Boulevard, Division 1, St. Louis, Missouri 63101, Respondent.
